

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of) Case No. 2023-1011
BIRCH SOLAR 1, LLC for a Certificate)
of Environmental Compatibility and Public) On Appeal from The Ohio Power Siting Board
Need for a Solar-Powered Electric Facility)
Located in Allen and Auglaize Counties, Ohio.) Case No. 20-1605-EL-BGN

**BRIEF OF AMICI CURIAE AMERICAN CLEAN POWER ASSOCIATION,
MAREC ACTION, AND THE UTILITY SCALE SOLAR ENERGY COALITION OF
OHIO IN SUPPORT OF BIRCH SOLAR 1, LLC**

James B. Hadden (0059315), Counsel of
Record
Murray Murphy Moul + Basil LLP
1114 Dublin Road
Columbus, OH 43215
Telephone: 614.488.0400
Facsimile: 614.488.0401
hadden@mmb.com

*Counsel for American Clean Power
Association, MAREC Action, and The Utility
Scale Solar Energy Coalition of Ohio, Amici
Curiae*

Kara Herrnstein (0088520)
Dylan F. Borchers (0090690)
Bricker Graydon LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: 614.227.2300
Facsimile: 614.227.2390
kherrnstein@bricker.com
dborchers@bricker.com

Counsel for Appellant Birch Solar 1, LLC

David Yost (0056290)
Attorney General of Ohio

John H. Jones (0018010)
Section Chief

Werner Margard
Ambrosia Wilson
30 East Broad Street, 16th Floor
Columbus, OH 43215-3793
Telephone: 614.644.4397
Facsimile: 614.644.8764
E-mail: john.jones@ohioattorneygeneral.gov
Werner.margard@ohioattorneygeneral.gov
Ambrosia.wilson@ohioattorneygeneral.gov

Counsel for Appellee Ohio Power Siting Board

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I. SUMMARY OF ARGUMENT

On October 20, 2022, the Ohio Power Siting Board (“Board”) denied Birch Solar LLC (“Birch”) a certificate of environmental compatibility and public need, necessary for a 300-megawatt solar facility located on privately leased land throughout Shawnee Township, Allen County and Logan Township, Auglaize County, Ohio. The Board has subsequently denied an application for rehearing. In rejecting the application, the Board found that the Birch project fails to serve the public interest according to R.C. 4906.10(A). This finding failed to consider the evidence presented to the record, pointing not just to the significant economic and environmental benefits of the project, but also to broadscale support for the project. Instead, the decision was the result of local objections, unsupported by evidence presented to the record, related to the siting of renewable energy. As such, the finding did not adequately and impartially consider public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Such a decision is not only contrary to the Board’s obligations, and previous decisions, but it sets a dangerous precedent that could derail many types of economic development projects and further curtail investment in Ohio and other states.

II. STATEMENT OF INTEREST OF AMICI CURIAE

American Clean Power Association (“ACP”) is a national trade association representing the renewable energy industry in the United States, bringing together over 1,000 member companies, 120,000 members, and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, ACP seeks to enable the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system.

MAREC Action is a coalition of over 40 utility-scale solar, wind, and battery storage developers, wind turbine and solar panel manufacturers, and public interest organizations dedicated to promoting the growth and development of renewable energy in Ohio and the broader region where the PJM Interconnection, LLC (“PJM”) the Regional Transmission Organization operates. Many of MAREC Action’s members have developed or are developing projects in Ohio.

The Utility Scale Solar Energy Coalition of Ohio (“USSEC”) is a non-profit organization representing over 30 large-scale solar developers, manufacturers, and industry leaders working to meet the demand for clean energy and drive economic development benefitting Ohio’s communities, schools, and rural landowners. USSEC’s mission is to provide transparency to Ohio’s communities, education for Ohio’s citizens, and advocate for public policy that will further the solar industry in the State of Ohio.

As industry organizations, ACP, MAREC Action, and USSEC have an interest in supporting and promoting ambitious efforts underway at the federal, state, and local levels to increase renewable energy generation, including work to harness solar energy in Ohio. Such efforts are key to long term environmental sustainability, national security, economic prosperity, and energy system reliability and capacity. If these efforts are to be realized, siting decisions must be made impartially, and founded in fact. Decisions cannot be made because of unscientific, local objection, as is seen here. As a result, in furtherance of interests of its members, ACP, MAREC Action, and USSEC submit this amicus brief to urge the Ohio Supreme Court to address the Board’s denial of certificates to Birch.

III. STATEMENT OF FACTS

On October 20, 2022, the Board denied the application of Birch Solar for a certificate of

environmental compatibility and public need for the construction, operation, and maintenance of a 300-megawatt solar farm on 2,345 acres of privately leased land throughout Shawnee Township, Allen County and Logan Township, Auglaize County, Ohio (“Project”). The land is mainly agricultural and partially located in a historic oil and gas field. The Project received support from a coalition of area residents, the Ohio Farm Bureau Federation, the local International Brotherhood of Electrical Workers (“IBEW”) union chapter, and the Ohio Chamber of Commerce. On June 15, the Board denied applications for rehearing.

IV. ARGUMENT

A. Proposition of Law No. 1: The Board failed to consider the public interest, convenience, and necessity of the Project under R.C. 4906.10(A)(6).

The Board’s finding that the Birch Project is not in the public interest is contrary to the evidence on the record, and counter to the Board’s obligations, to, as the Board itself states, ensure that “the determination of public interest, convenience, and necessity” be examined through a broad lens.” (Order, ¶ 68.) In reaching its decision, the Board did not meet its own broad standard, failing to weigh relevant factors related to the public benefit of the Project. These include but are not limited to local economic development, regional and statewide economic development, job creation, reduced energy costs and emissions for Ohio ratepayers, new local revenues, maintaining a competitive marketplace, safety and system reliability. The Board unreasonably disregarded the evidence that this Project would provide such benefits, and instead denied the Project based on the mere existence of some local opposition—without regard for the legitimacy or strength of that opposition. As discussed below, such decision is counter to the Board’s obligations under R.C. 4906.10(A)(6) to consider the public interest, convenience, and necessity of the Project.

In general, a “public interest” determination should appropriately balance local concerns and statewide benefits. A determination should not place undue weight on any one factor as doing so could arguably result in a decision that is against broader public interest. For example, by considering only local opposition to energy infrastructure when arriving at a decision, the Board discounts statewide and regional benefits that are created by this infrastructure. As such Ohioans do not benefit from, amongst other things, increased generation capacity, and benefits to the local economy such as new jobs, wages, and local revenue. Precedent that allows public interest to be determined based on a single factor—whether there is local opposition, as seen here—is too narrow a test, and will ultimately harm rather than benefit public interest. The need for a broad application of the public interest determination can clearly be seen in the number of comments filed in response to the Board’s request for comments on revisions to the Ohio Code, including the public interest, convenience, and necessity” analysis under Ohio Revised Code Section 4906.10(A). A number of these comments, including from the Ohio Chamber of Commerce and the Ohio Energy Group, stressed the importance of considering broader policy, economic, and energy goals, when adopting new rules related to the public interest determination. (See *In the Matter of the Ohio Power Siting Board’s Review of Ohio Adm. Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7*, Case No. 21-902-GE-BRO, Reply Comments of The American Clean Power Association, MAREC Action, and the Utility Scale Solar Energy Coalition of Ohio (Sept. 2, 2022).)

1. The definition of public interest requires an objective review of record evidence.

To determine whether a project is in the “public interest, convenience, and necessity,” the Board should “balance projected benefits against the magnitude of potential negative impacts on the local community.” (*In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN,

Order, Opinion, and Certificate at 28 (June 24, 2021.) In making this public interest determination, the Board has previously employed a comprehensive view of potential impacts. (*In re Application of American Transmission Systems, Inc.*, Case No. 19-1871-EL-BTX, Order, Opinion, and Certificate at 31 (May 19, 2022.) The Supreme Court of Ohio (“Supreme Court”) and the Board both asserted that R.C. 4906.10(A)(6) requires a broad analysis and consideration of whether a project benefits the general public. *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 30. Previously, the Board has considered various factors, including public interaction, economic benefits, public safety, energy generation, sound, electrical interference, and visual impacts. (See, e.g., *In re Application Cadence Solar Energy LLC*, Case No. 20-1677-EL-BGN, Opinion, Order, and Certificate at 107-111 (Nov. 18, 2021); *In re Application Aquila Fulton Cty. Power, LLC*, Case No. 01-1022-EL-BGN, Opinion, Order and Certificate at 12-13 (May 20, 2002) (public need for electrical generation, sound, economic impact, visual impact, electric magnetic fields and impact to water usage).) It has also considered the impact on prosperity throughout Ohio and the public interest in reliable, renewable energy generation. (*In re Application Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Opinion, Order, and Certificate at 291 (June 24, 2021) (“For example, this factor should consider the public’s interest in energy generation that ensures continued utility services and the prosperity of the State of Ohio”).) In previous proceedings, the Board has further found that the public interest is served by adding clean, sustainable generation capacity, and by benefitting the local economy through the addition of new jobs, wages, and local revenue. (*In Re Application of Hardin Solar II, LLC*, 18-1360-EL-BGN, Opinion, Order, and Certificate at 24-25 (May 16, 2019).) The Supreme Court upheld determinations by the Board that a project satisfies the public interest requirements under R.C. 4906.10(A)(6) by helping to meet renewable energy goals and

serving electric utility needs, maintaining a competitive marketplace, as well as promoting employment benefits. See *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869; *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142; *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472. Consistent with its obligations under R.C. 4906.10(A)(6) and with clearly established precedent, the Board must determine whether a project is in the public interest by accounting for the various ways in which in-state renewable generation has tangible and immediate benefits for Ohioans—including consumer access to power, maintaining a competitive marketplace, and safety. See *In re Champaign Wind*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142. As discussed below, the Board failed to do so when making its determination for the Birch Project.

2. The public interest analysis requires objective review of record evidence, without additional weight added to unsubstantiated comments.

In arriving at a decision, the Board must weigh negative public opinion against the broader public benefit that a project will create. It must further evaluate the objections, and not give undue, if any, weight to opinions expressed in an unsubstantiated and ideological manner, especially if these opinions are verifiably based on misinformation. Such a standard is not only consistent with the Board’s obligations under R.C. 4906.10(A)(6), but is also clearly held up by past precedent: the Board has regularly granted certificates to projects where local opposition outnumbered project proponents. (See, e.g., *In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Opinion, Order, and Certificate (Nov. 21, 2019); *In re Application Cadence Solar Energy LLC*, Case No. 20-1677-EL-BGN, Opinion, Order, and Certificate at 107-111 (Nov. 18, 2021) (recognizing setbacks of 300 feet to nonparticipating homes, public safety,

and public engagement efforts while also recognizing that roughly two-thirds of comments were opposed to the project but finding that many of subject areas addressed by commenters were addressed in the Staff Report).) In addition, the Board has granted certificates to projects when unsubstantiated views from intervening local government officials are raised in opposition. (See, e.g., *In re Application Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate at 129, 135-36 (Oct. 21, 2021) (holding that despite the intervening township concerns about reduced property values, the project was not expected to decrease property values near the proposed facility)). Precedent establishes that local opposition—by itself—should not result in application denial or recommendation from Staff for denial. Interpreting public interest based on one single factor—whether there is any local opposition, as the Board did in this instance—is too narrow a test and a drastic and unsound departure from established precedent.

Here, the Board failed to evaluate the objective and factual nature of the comments received and to consider both the weight and sufficiency of the evidence. Instead, the Board relied on, and gave significant weight to, unverified public comment. For example, the Board relied on concerns raised by Auglaize and Allen Counties about potential impacts of the Project. However, Auglaize and Allan Counties provided no evidence that these impacts would in fact occur. (Order, ¶ 69.) Moreover, both Birch Solar and the Ohio Department of Health responded with uncontested evidence that either addressed and resolved the concerns or found that the concerns were unsubstantiated.¹ Despite this, the Board pointed to these concerns in its Order denying the permit. (Order, ¶ 64.) While it is important that valid local concerns are considered, they should *only* be considered to the extent that they are evidence-based. A decision should not

¹ Reply Brief of Birch Solar 1, LLC at 12-14 (Sept. 29, 2022); Health Assessment Section Bureau of Environmental Health and Radiation Protection Ohio Department of Health, *Ohio Department of Health Solar and Photovoltaics Summary and Assessment* (Apr. 22, 2022).

be made unless it is firmly based on the record established in the evidentiary process. Failure to do so diminishes the importance of such a record and in essence grants local governments a veto over state siting decisions, undermining the entire purpose of a state-based siting board. A Board decision can and should not be entirely divorced from the evidentiary process, as is seen here. Finally, the Board did not differentiate between sworn evidence from parties and unsworn public comments. Instead, it looked to the breakdown of public comment, and simply tallied the number of comments for and against the project. (Order, ¶ 70 (noting the public comments filed in the case disfavor the project at a ratio of approximately 80 to 20 percent).) Placing undue weight on the percentage of comments for and against a project when making a permitting decision is not only contrary to the Board's obligations, but it is simply bad practice. This type of decision-making would regularly lead to permit denials based on the opinions of a vocal, energized minority—even if the opinions of this minority were discredited and unproven. As a basic principle, public comment must be thoroughly analyzed for its credibility, *and* it must be weighed against other factors. Opinions expressed in an unsubstantiated and ideological manner, especially when verifiably based on misinformation, cannot carry the same weight as evidence-based testimony and comments, as was seen in this Order.

3. The overwhelming weight of the evidence indicates that the Project would provide enormous economic benefits regionally and statewide.

Along with giving undue weight to unproven objections, the Board failed to meaningfully consider positive local economic impacts of the Birch Project. This is counter to the Board's obligations to determine public interest under R.C. 4906.10(A)(6), and contrary to previous Board practice. In over thirty prior cases, the Board acknowledged that solar facilities would have an overall positive impact on the local economy, through increased labor wages, purchasing

of goods, annual lease payments, and other revenue.² The Project’s Application and Socioeconomic Report detailed a number of positive economic impacts, including:

² *Vinton Solar Energy Facility*, Case No. 17-0774, Staff Report at 22 (July 5, 2018); *Hillcrest Solar Farm*, Case No. 17-1152, Opinion, Order, and Certificate at i-144 (Feb. 15, 2018); *id.*, Staff Report at 22 (Nov. 15, 2017); *Willowbrook Solar Farm*, Case No. 18-1024, Staff Report at 23 (Feb. 4, 2019); *Highland Solar Farm*, Case No. 18-1334, Opinion, Order, and Certificate at i-136 (May 16, 2019); *id.*, Staff Report at 19 (Mar. 4, 2019); *Hardin Solar Energy II Facility*, Case No. 18-1360, Opinion, Order, and Certificate at i-139 (May 16, 2019); *id.*, Staff Report at 20 (Feb. 26, 2019); *Nestlewood Solar Facility*, Case No. 18-1546, Opinion, Order, and Certificate at i-149 (Apr. 16, 2020); *id.*, Staff Report at 24 (May 15, 2019); *Alamo Solar Farm*, Case No. 18-1578, Opinion, Order, and Certificate at i-170 (June 24, 2021); *id.*, Staff Report at 22 (May 28, 2019); *Madison Solar Project*, Case No. 19-1823, Opinion, Order, and Certificate at i-152 (Mar. 18, 2021); *id.*, Staff Report at 23 (Dec. 22, 2020); *Atlanta Farms Solar Farm*, Case No. 19-1880, Opinion, Order, and Certificate at i-160 (Dec. 22, 2020); *id.*, Staff Report at 26 (Oct. 7, 2020); *Madison Fields Solar*, Case No. 19-1881, Opinion, Order, and Certificate at i-155 (Jan. 21, 2021); *id.*, Staff Report at 25 (Nov. 18, 2020); *Fox Squirrel Solar Farm*, Case No. 20-0931, Opinion, Order, and Certificate at i-156 (July 15, 2021); *id.*, Staff Report at 23 (Mar. 15, 2021); *Yellowbud Solar*, Case No. 20-0972, Opinion, Order, and Certificate at i-143 (Feb. 18, 2021); *id.*, Staff Report at 24 (Nov. 30, 2020); *Arche Solar Farm*, Case No. 20-0979, Opinion, Order, and Certificate at i-152 (Apr. 15, 2021); *id.*, Staff Report at 23 (Jan. 11, 2021); *Powell Creek Solar Farm*, Case No. 20-1084, Opinion, Order, and Certificate at i-153 (July 15, 2021); *id.*, Staff Report at 24 (Mar. 16, 2021); *New Market Solar*, Case No. 20-1288, Opinion, Order, and Certificate at i-148 (Mar. 18, 2021); *id.*, Staff Report at 21 (Jan. 4, 2021); *Clearview Solar Project*, Case No. 20-1362, Opinion, Order, and Certificate at i-173 (Oct. 21, 2021); *id.*, Staff Report at 27 (May 24, 2021); *Ross County Solar*, Case No. 20-1380, Opinion, Order, and Certificate at i-185 (Oct. 21, 2021); *id.*, Staff Report at 24 (Mar. 22, 2021); *Union Solar*, Case No. 20-1405, Opinion, Order, and Certificate at J67 (Feb. 17, 2022); *id.*, Staff Report at 24 (May 19, 2021); *Wheatsborough Solar*, Case No. 20-1529, Opinion, Order, and Certificate at J60 (Sept. 16, 2020); *id.*, Staff Report at 29 (June 22, 2021); *Mark Center Solar Project*, Case No. 20-1612, Opinion, Order, and Certificate at J52 (Sept. 16, 2021); *id.*, Staff Report at 23 (May 10, 2021); *Cadence Solar*, Case No. 20-1677, Opinion, Order, and Certificate at J82 (Nov. 18, 2021); *id.*, Staff Report at 26 (June 14, 2021); *Hardin Solar III*, Case No. 20-1678, Opinion, Order, and Certificate at J60 (Sept. 16, 2021); *id.*, Staff Report at 27 (June 28, 2021); *Pleasant Prairie Solar*, Case No. 20-1679, Staff Report at 30 (July 1, 2021); *Yellow Wood Solar*, Case No. 20-1680, Staff Report at 29 (Oct. 4, 2021); *Union Ridge Solar*, Case No. 20-1757, Opinion, Order, and Certificate at J73 (Jan. 20, 2022); *id.*, Staff Report at 29 (Aug. 16, 2021); *Juliet Solar*, Case No. 20-1760, Opinion, Order, and Certificate at J53 (Nov. 18, 2021); *id.*, Staff Report at 28 (Aug. 24, 2021); *Sycamore Creek Solar*, Case No. 20-1762, Opinion, Order, and Certificate at J68 (Nov. 18, 2021); *id.*, Staff Report at 25 (July 7, 2021); *Tymochtee Solar*, Case No. 21-0004, Opinion, Order, and Certificate at J72 (Mar. 17, 2022); *id.*, Staff Report at 31 (Oct. 8, 2021); *Marion County Solar*, Case No. 21-0036, Opinion, Order, and Certificate at J66 (Nov. 18, 2021); *id.*, Staff Report at 29 (Sept. 13, 2021); *Border Basin Solar*, Case No. 21-0277, Staff

- Support approximately 400 to 500 jobs throughout construction both onsite and with related services and 5-10 full-time jobs during O&M stage;
- Contribute an estimated payroll contribution of \$32 to \$39 million during the 12 to 18-month construction phase;
- Contribute an estimated \$4.6 to \$9.2 million in payroll contributions during the 35-year operational life of the Project;
- Generate during the Project’s O&M phase, total annual economic benefit of approximately \$3.8 - \$5.5 million;
- Individual economic benefit payments to households within 500 feet of the Project, ranging from \$10,000 to \$50,000;
- A direct, one-time contribution by the Project developer to the community development fund of \$500,000; and
- Once completed, project developer anticipated entering into a payment in lieu of taxes (“PILOT”) in Allen and Auglaize Counties, with estimated contributions of \$2.1 to \$2.7 million annually, or approximately \$73.5 to \$94.5 million of the life of the Project.³

The Board should have considered all potential local impacts, and the undisputed positive impacts in this case should have carried far more weight than unsubstantiated misinformation discussed above.

Beyond the local economic benefits, the Board also failed to acknowledge the significant economic benefit to the region and State of Ohio. The Board’s failure to consider these broader positive impacts is patently unreasonable and would have a chilling effect on energy investment

Report at 31 (Mar. 16, 2022); *South Branch Solar*, Case No. 21-0669, Staff Report at 30 (Apr. 11, 2022).

³ Exhibit G to Birch Solar LLC application. The information is found in the application at 27-28.

in Ohio. The Ohio Chamber of Commerce, in their public comment in support of the Project, said that it is critical for Ohio to compete, given that the state “is in a constant race against other states to attract business.” (Ohio Chamber of Commerce Public Comment (Sept. 23, 2022).) Those businesses are increasingly “demanding renewable energy – especially affordable solar energy – from the state in which they choose to locate.” (*Id.*)

In arriving at its decision, the Board must reasonably weigh a project’s benefit against potential impacts, including local opposition. Here, the Board gave undue weight to opposition, for which no evidence was submitted, and failed to give sufficient consideration of the benefits of the Project.

B. The Board must follow the same standards for all permit decisions.

Unfortunately, the Birch Project is the latest example of a pernicious trend where the Board denies large-scale solar projects based on the mere existence of some local opposition. These decisions are without regard for the legitimacy or strength of that opposition, the evidence presented at the hearing, or the benefits the Project would bring to Ohio. This trend is a departure from the established state-wide permitting practice of looking at projects objectively and holistically.

In comments submitted to the Board in response to a request for comments on a revision to the “public interest” determination regulations, the Ohio Chamber of Commerce describes the recent trend in application cases, highlighting the need for clarity from the Board regarding the meaning of public interest when comparing two recent cases where both projects had opposition from local residents, officials, and emergency response personnel, yet the Staff Reports yielded different recommendations:

In the 2016 Duke pipeline extension case most of the 1,390 comments were opposed. That opposition slightly altered the route of the pipeline but did not prevent the project from getting a certificate. In contrast, staff recommended the roughly 40 comments in opposition to the Scioto Farms Solar application were too much for the project to go forward at all. Staff said “[w]hile some local opposition is common in many siting projects,” the local opposition in this case made the project against the public interest. However, this staff report does not explain why the overwhelming opposition in Scioto Farms, a solar project, is different from the Duke natural gas case. Each of these projects had opposition by local residents, officials, and emergency response personnel but very different staff recommendations.

(In the Matter of the Ohio Power Siting Board’s Review of Ohio Adm. Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7, Ohio Chamber of Commerce Initial Comments at 1 (Aug. 5, 2022).)

Evaluating the public interest requires not just a careful weighing of evidence but also consistency in reasoning when that evidence is applied to a permitting decision that could have enormous benefits for the people of Ohio. Projects must be treated equally if the Board is to uphold its obligation to make a determination in the public interest.

V. CONCLUSION

The Board’s decision was the result of local opposition, unsupported by evidence, related to the siting of renewable energy. Such a decision is not only contrary to the Board’s statutory obligations, and previous decisions, but it sets a dangerous precedent that could derail many types of economic development projects and further curtail investment in Ohio and other states. Moreover, failure to cite critical energy infrastructure means Ohioans will not recognize the benefits of such infrastructure, including reduced energy costs, new local revenues, maintaining a competitive marketplace, and safety and system reliability. As such, the decision is against the

public interest, and poses a threat to energy security and economic prosperity. ACP, MAREC Action, and USSEC respectfully request that the Board's Order be reversed.

Respectfully submitted,

/s/ James B. Hadden

James B. Hadden (0059315)
Murray Murphy Moul + Basil LLP
1114 Dublin Road
Columbus, OH 43215
Telephone: 614.488.0400
Facsimile: 614.488.0401
Email: hadden@mymb.com

*Counsel for American Clean Power Association,
MAREC Action, and The Utility Scale Solar Energy
Coalition of Ohio, Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on October 23, 2023 and was served upon the Chairperson of the Ohio Power Siting Board, Jenifer French, by leaving a copy at her office at 180 East Broad Street, Columbus, Ohio 43215, and upon the following counsel of record via email:

Kara Herrnstein
Dylan F. Borchers
kherrnstein@bricker.com
dborchers@bricker.com
Counsel for Appellant Birch Solar 1, LLC

Edwin A. Pierce
epierce@auglaizecounty.org
*Counsel for Auglaize County Commissioner
and Board of Trustees of Logan Township,
Ohio*

Eric L. Christensen
John A. Heer
EChristensen@bdlaw.com
jlandfried@bdlaw.com
HJacobs@bdlaw.com
JReagan@bdlaw.com
JHeer@fairshake-els.org
*Counsel for Allen Auglaize Coalition for
Reasonable Energy*

John H. Jones
Werner Margard
Ambrosia Wilson
john.jones@ohioattorneygeneral.gov
Werner.margard@ohioattorneygeneral.gov
Ambrosia.wilson@ohioattorneygeneral.gov
Counsel for Appellee Ohio Power Siting Board

Robert Dove
RDove@keglerbrown.com
*Counsel for International Brotherhood of
Electrical Workers, Local Union 32*

Clay W. Balayeat
clay@cbalyeat.com
Counsel for Shawnee Township Trustees

Amy Milan
Chad Endsley
amilam@ofbf.org
cendsley@ofbf.org
Counsel for Ohio Farm Bureau Federation

/s/ James B. Hadden

James B. Hadden (0059315)